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OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF JOHN T. JOYCE, *ET AL.*, TRUSTEES OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, John T. Joyce and the other Trustees of the Bricklayers and Trowel Trades International Pension Fund ("IPF") respectfully move this Court for leave to file the accompanying brief as *Amicus Curiae* in support of Petitioner. Petitioner consents to the filing of this brief; Respondents do not.

The IPF successfully litigated the MPPAA[1] withdrawal liability statute of limitations question now before this Court in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). *Sandoz*'s answer to that question—the one advanced by the IPF—was explicitly rejected by the Ninth Circuit below. The IPF and its participants have an interest in preserving their

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[1] "MPPAA" refers to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461, which amended the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

victory in *Sandoz*, which will be turned into a *de facto* defeat if this Court affirms the judgment below.

The IPF, a multiemployer ERISA pension fund that is not "fully funded" (such that its employers may be subject to withdrawal liability under MPPAA), operates in the "construction industry," within the meaning of MPPAA. 29 U.S.C. § 1383(b). The IPF receives contributions from over 7,000 participating employers located in every state and provides benefits to over 16,000 participants. Over 90% of these employers have seven or fewer employees, and many operate seasonally.

It is difficult for the IPF to collect withdrawal liability from such companies in the construction business, an industry which, as Congress has recognized, is notable for its transitory nature. *Sandoz*, 871 F.2d at 1123. These difficulties are compounded by the IPF's status as a "construction industry" fund governed by different and more stringent rules for determining when an employer has "withdrawn."

The Ninth Circuit's rule adds to these burdens by engrafting a statute of limitations restriction that, we submit, is contrary to MPPAA's text. The IPF's position prevailed in *Sandoz*, and the IPF believes that this Court would benefit from having that position before it in passing on the merits of the present Petition.

Respectfully submitted,

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BRIEF OF JOHN T. JOYCE, *ET AL.*, TRUSTEES OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* *

John T. Joyce and the other Trustees of the Bricklayers and Trowel Trades International Pension Fund ("IPF" or "Fund") successfully litigated *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). *Sandoz* presented a question that was then of first impression: when does a cause of action "arise" (29 U.S.C. § 1451(f)(1)) for statute of limitations purposes in a MPPAA[1] withdrawal liability case?

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* This brief was authored in whole by counsel for *amicus curiae*. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

[1] "MPPAA" or the "Act" refers to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461, which

Sandoz's answer to that question—the one advanced by the IPF—was explicitly rejected by the Ninth Circuit below. The IPF and its participants have an interest in preserving their 1989 victory in *Sandoz*, which will be transformed into a *de facto* defeat if this Court affirms the judgment below.

INTRODUCTION

The IPF is a multiemployer ERISA pension fund that provides pension and other benefits to over 16,000 participants. It has offices only in Washington, D.C., but receives contributions from over 7,000 participating employers located in every state. Over 90% of these employers have seven or fewer employees, and many operate seasonally, resulting in a constant fluctuation of hours reported to the IPF upon which contributions must be paid.

Because the IPF is not "fully funded," its employers may be subject to certain MPPAA liabilities that the Act requires the IPF to collect upon an employer's "withdrawal" from the Fund. A MPPAA "withdrawal" occurs in most industries when an employer "permanently ceases to have an obligation to contribute" to the plan *or* "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). However, for "construction industry" funds like the IPF, the MPPAA rule is more complex and stringent: a construction industry employer "withdraws" from such a plan only if it (1) "ceases to have an obligation to contribute under the plan" *and* (2) "continues to perform work in the jurisdiction . . . of the type for which contributions were previously required, or . . . resumes such work within 5 years." 29 U.S.C. § 1383(b).[2]

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amended the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

[2] Congress enacted this provision in order to accommodate construction industry employers that moved from one locality to the next, depending upon work demand. H.R. Rep. No. 96-869, pt. 1, at 75-76 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2943-44; Senate Comm. on Labor and Human Resources, 96th Cong., Summary and Analysis of Consideration of S. 1076 at 13 (Comm. Print 1980); *see also Sandoz*, 871 F.2d at 1123.

IPF employers report their level of employment, and resulting contribution obligations, on standard forms submitted to the Fund. When an employer ceases to report contributions, the IPF does not know if the employer has "withdrawn" from the IPF within the meaning of § 1383(b), or has merely moved on to a construction project in another state.[3] As a result of the restrictive statutory definition of "withdrawal" in the construction industry, it is usually impossible for the IPF to impose liability on an employer unless the Fund receives information that the company has gone "non-union" in the jurisdiction—refuses to sign a collective bargaining agreement and continues to do the same type of work (*e.g.*, brick or tile laying) in the same jurisdiction.

SUMMARY OF ARGUMENT

Sandoz held that an ERISA plan's "cause of action" for collection of withdrawal liability for MPPAA statute of limitations purposes "arises" only after the plan unsuccessfully demands that the employer pay its withdrawal liability. The Ninth Circuit here, following its prior decision in *Board of Trustees of Construction Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), rejected *Sandoz* and held instead that the statute of limitations begins to run on the date of an employer's "withdrawal" from the plan. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 73 F.3d 971 (9th Cir. 1996). *Sandoz* (but not the Ninth Circuit) faithfully adhered to "the words of [ERISA's] text regarding the *specific* issue under consideration" (*Mertens v. Hewitt Associates*, 508 U.S. 248, 261

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[3] Even if that employer operates without a collective bargaining agreement in another state, there is no "withdrawal" because of the "continues to perform work in the jurisdiction" requirement of 29 U.S.C. § 1383(b).

(1993) (emphasis in original)), and remained true to the plain meaning of MPPAA's language (*Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995) ("*Schlitz*")).

MPPAA contains a carefully crafted and precise withdrawal liability scheme that culminates in arbitration. Contrary to the Ninth Circuit's approach, "withdrawal," without more, does not require an employer to pay anything. *Schlitz*, 513 U.S. at 423. Nor does it in any way "adversely affect" the plan (the statutory precondition for a plan's suit against the employer); rather, it simply sets in motion MPPAA's procedural machinery. *Sandoz*, 871 F.2d at 1124.

Thibodo also opines that "[t]here is little reason for the second clause [of 29 U.S.C. § 1451(f), which provides that the limitations period runs 3 years from the time the plan acquired knowledge] if the cause of action does not come into existence until demand for payment is made and refused." 34 F.3d at 918. But such a construction again ignores the statutory text, which states that § 1451 applies not only to withdrawal actions, but also to many other types of suits, including transfer of plan assets, reorganization of plans and benefits after termination. *See Sandoz*, 871 F.2d at 1125.

The Ninth Circuit's failure to adhere to MPPAA's text in the above respects alone warrants reversal. Beyond that, the court of appeals' decision is bottomed on a series of fundamental errors. For example, the *Thibodo* panel's conclusion was driven by its "view" that *Sandoz* "improperly" places the running of the statute of limitations period in the plan's "control." 34 F.3d at 917, 918 n.7. That view rests on a misunderstanding of the statutory scheme, because the "[a]s soon as practicable" requirement of MPPAA means that an arbitrator, not the plan, controls the timeliness issue. Moreover, the MPPAA statute of limitations is no more "improper" than analogous statutes

sustained by this Court in *Rawlings v. Ray*, 312 U.S. 96 (1941), and *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967).

ARGUMENT

Under MPPAA, an action for collection of withdrawal liability must be brought "6 years after the date on which the cause of action arose." 29 U.S.C. § 1451(f)(1). The District of Columbia Circuit, after a meticulous analysis of the statutory language, ruled that a cause of action "arises" only after the plan first notifies the employer of the withdrawal liability and the employer then fails to make the payment demanded. *Sandoz*, 871 F.2d at 1124. Dismissing the employer's argument that the statute ran from the time of "withdrawal," the *Sandoz* court concluded that before the employer refuses to pay, no money is "due and owing" (29 U.S.C. § 1401(b)(1)) to the plan by the employer. 871 F.2d at 1122, 1124; *accord Schlitz*, 513 U.S. at 423 ("the statute makes clear that the withdrawing employer owes nothing until its plan demands payment"). Because no money is due upon "[t]he employer's complete withdrawal," that event, "without more, is an occurrence that hardly affects the plan adversely"; until the plan is so affected, it cannot sue the employer under MPPAA to collect. *Sandoz*, 871 F.2d at 1122, 1124.[4]

The Ninth Circuit below rejected *Sandoz* on the basis of its prior controlling decision in *Thibodo*.[5] The *Thibodo*

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[4] The Seventh and Third Circuits subsequently followed *Sandoz* in *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994), and *Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994).

[5] Because the Ninth Circuit deemed *Thibodo* to have "spoken dispositively on this issue" (*Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 73 F.3d 971, 973 (9th Cir. 1996)) and its analysis to control this case, we discuss the two cases interchangeably in this brief.

court decided that the statute of limitations "begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met," that is, on the day "withdrawal" occurs. 34 F.3d at 917. The court listed several factors which led it to that conclusion. First, even in the construction industry, determining whether an employer has withdrawn supposedly is "relatively straightforward." *Id.* at 917-18. Second, the court saw "no reason . . . to choose a date of limitations that is in the control of the plaintiff." *Id.* at 918. Third, there would be "little reason for" the second clause of the limitations provision (3 years from discovery) if the 6-year period were triggered by the fund's demand. *Id.*

As we shall demonstrate, the Ninth Circuit's opinion is at odds with the plain language of the statute and is otherwise fatally flawed.

I. ERISA'S PLAIN LANGUAGE REQUIRES REVERSAL

ERISA, as amended by MPPAA, "provides an elaborate system to ensure the financial integrity of multiemployer pension funds." *Sandoz*, 871 F.2d at 1120. MPPAA discourages employers from withdrawing from a "financially shaky plan" by "impos[ing] a withdrawal charge on all employers withdrawing from an underfunded plan." *Schlitz*, 513 U.S. at 416-17. And, "it set forth a detailed set of rules for determining, and collecting, that charge." *Id.* at 417.

These rules first come into play when the plan calculates the liability, and then "notif[ies]" the employer of (i) the amount of the liability and (ii) the schedule for liability payments and "demand[s] payment in accordance with the schedule." 29 U.S.C. § 1399(b)(1). Within 90 days of receiving the demand, the employer may ask the plan to review the determination. 29 U.S.C. § 1399(b)(2)(A). The plan shall reply "[a]fter a reasonable review." 29

U.S.C. § 1399(b)(2)(B). In the interim, the employer must begin making payments according to the schedule, notwithstanding any dispute over the fact or amount of liability. 29 U.S.C. § 1399(c)(2).[6] Thereafter, either party may initiate arbitration to resolve any outstanding disputes. 29 U.S.C. § 1401(a)(1). Arbitration is central to the statutory mechanism by which an employer may challenge the fund's assessment of withdrawal liability.[7] Only then may the plan sue to "enforce, vacate, or modify" the arbitrator's award. 29 U.S.C. § 1401(b)(2).[8]

MPPAA "carefully distinguishes between the circumstances that define complete withdrawal and those which give rise to a cause of action." *Sandoz*, 871 F.2d at 1123. In the construction industry, "withdrawal" occurs when an employer "ceases to have an obligation to contribute" and resumes work in that jurisdiction "within 5 years" of that date. 29 U.S.C. § 1383(b)(2). In contrast, a cause of action can "arise" under MPPAA's withdrawal procedures only *after* (1) an "arbitration proceeding" (29 U.S.C. § 1401(a)(1)), (2) the failure of an employer to make interim payments (29 U.S.C. § 1399(c)(2)), or (3) a "default" by the employer in making a required payment (29 U.S.C. § 1399(c)(5)). Until one of these three statutorily defined events occurs, a plan cannot "bring an

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[6] If the employer fails to make interim payments, the fund may sue to compel payment, consistent with MPPAA's "pay now, dispute later" procedure. *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

[7] MPPAA mandates that the assessment be made "[a]s soon as practicable" (29 U.S.C. § 1399(b)(1)), a requirement that may be raised by the employer as a defense in the statutory arbitration. *See, e.g., Ludington News Co.*, 9 Employee Benefits Cas. (BNA) 1913, 1919 n.9 (1988) (Cornelius, Arb.).

[8] If arbitration is not initiated, the amounts demanded by the plan shall be "due and owing on the schedule set forth by the plan," and the plan then "may bring an action in a State or Federal court of competent jurisdiction for collection." 29 U.S.C. § 1401(b)(1).

action" against the employer to collect withdrawal liability. 29 U.S.C. §§ 1401(b)(1), 1401(b)(2).

The text of MPPAA's "elaborate system" compelled the *Sandoz* court to conclude that it was only "Sandoz's uncured failure to pay the sum demanded" that "adversely affected the plan, thus giving rise to a cause of action." 871 F.2d at 1120, 1122.[9] The District of Columbia Circuit's reliance on the statutory language comports with ERISA's "carefully crafted and detailed enforcement scheme," which requires adherence to "the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 U.S. at 254, 261 (emphasis in original). It is equally consistent with this Court's teachings that it is the texts of ERISA and its MPPAA amendments, not their "basic objectives," that control. In *Schlitz*, for example, this Court concluded that the statute's language required interest to be calculated from the first day of the plan year following withdrawal, despite the plan's argument that such an "interpretation works against the basic objective of the statute, requiring a withdrawing employer to pay a fair share of the underfunding." 513 U.S. at 422, 425. Likewise, in *Mertens*, this Court looked to "the words of [ERISA's] text" rather than to its "basic purpose" in declining to read into the statute a cause of action against nonfiduciaries. 508 U.S. at 261; *see also Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513, 1515 (1997).

The Ninth Circuit's rationale does not rest on the statutory language, as it must under *Mertens* and *Schlitz*.

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[9] *Sandoz* did not have to reach the subsidiary question of how the limitations period applies once the employer fails to pay the withdrawal liability demanded by the plan. We therefore do not address it, except to note our agreement with Petitioner that the Third Circuit's answer in *Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994), is the correct one under the reasoning of *Sandoz*.

Thus, *Thibodo* baldly concluded that "the limitations period . . . begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met" (34 F.3d at 917), without identifying the event that gives rise to a "cause of action" (29 U.S.C. § 1451(f)) for the purpose of computing the statute of limitations. The *Thibodo* panel drew support for this conclusion from its "view" (unsupported by anything in the statute) that its construction avoided "improperly plac[ing] the running of the limitations period in the control of the plaintiff." 34 F.3d at 917. But under *Schlitz* and *Mertens*, such a "view" cannot trump the statutory text.

The *Thibodo* court further misread the statute when it found "little reason for the second clause [of 29 U.S.C. § 1451(f)] if the cause of action does not come into existence until demand for payment is made and refused." 34 F.3d at 918. MPPAA on its face supplies the complete refutation:

> If the [time] bar applied only to plan sponsors' suits to collect delinquent withdrawal liability payments, the argument would carry some weight. However, the time bar applies to "[a]n action under this section." Section 1451, situated at the beginning of the subtitle part entitled "enforcement," is hardly limited to the type of suit before us. Indeed, section 1451 applies to suits brought by a wide variety of parties . . . [and] extends to matters far beyond collection of withdrawal liability [including, among other things, transfer of plan assets, reorganization of plans and benefits after termination of plans].

Sandoz, 871 F.2d at 1125.

II. EVEN IF THE ACT'S TEXT DID NOT COMPEL REVERSAL, THE JUDGMENT COULD NOT STAND

The court of appeals' failure to give effect to the "words of [ERISA's] text" alone requires reversal under this Court's precedent. While that is dispositive, we are con-

strained to point out that the Ninth Circuit's rationale fails even on its own terms.

First, the Ninth Circuit's conclusion that its result would "not lead to debilitating uncertainty" (*Thibodo*, 34 F.3d at 917) misapprehends the difficulty of determining when an employer has "withdrawn" under the statutory language governing the construction industry. *Sandoz* is a good example of that very difficulty. Clyde Sandoz Masonry Contractors, Inc. ("Sandoz"), a contractor located in Phoenix, Arizona, had been a participating employer in the IPF since at least 1975.[10] This contractor ceased doing business under the name "Sandoz" and stopped making contributions to the IPF in 1981. A new corporation, operating under the name "Griffith Masonry," continued in the same trade as Sandoz in the Phoenix area without being a party to a collective bargaining agreement. During a June 1987 meeting in Phoenix, the IPF Executive Director fortuitously learned that certain Phoenix area employers had gone "non-union"; only later did he discover specifically that Sandoz was operating "non-union" as "Griffith Masonry." Promptly thereafter, the IPF calculated Sandoz's withdrawal liability to be over $250,000, and sent a letter to Sandoz demanding payment. As *Sandoz* demonstrates, it is factually incorrect to say that detecting construction industry withdrawals is "straightforward" (*Thibodo*, 34 F.3d at 918).

Second, *Thibodo* deemed the *Sandoz* result to be "improper" because it purportedly "places the running of the limitations period in the control of the plaintiff." 34 F.3d at 917, 918 n.7. The Ninth Circuit cited no authority for this proposition, which ignores analogous precedent from this Court. When confronted with a strikingly similar statute of limitations, this Court in *Rawlings v. Ray*, 312 U.S. 96 (1941), read the operative language as did *Sandoz*. In *Rawlings*, the Comptroller of the Currency

[10] These facts are taken from the *Sandoz* Record on Appeal.

declared an Arkansas bank insolvent and imposed an assessment on its shareholders on November 6, 1935, payable on or before December 13, 1935. The shareholders failed to pay and, on December 7, 1938, the receiver brought suit. The applicable statute of limitations provided that an action must be commenced "within three years after the cause of action shall accrue." *Id.* at 97. Chief Justice Hughes gave short shrift to the shareholders' argument that the suit was time-barred by the November 6, 1935 assessment:

> While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. *Respondent was allowed until that date to pay and prior thereto suit coula not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935 [upon failure to pay], and the suit was in time.*

Id. at 98 (emphasis added). Here, as in *Rawlings*, an action does not "accrue" under MPPAA until demand has been made on the employer *and* the employer fails to pay.

Crown Coat Front Co. v. United States, 386 U.S. 503 (1967), is likewise instructive in this regard. There, a government contractor sued for wrongful denial of a contract claim by the Armed Services Board of Contract Appeals. The contract at issue provided for mandatory administrative review of disputes arising thereunder, with the final decision subject to judicial review. The contractor sought such judicial review more than six years after he had completed performance of the contract. The Government moved to dismiss, relying upon a limitations period requiring that civil actions against the United States be filed "within six years after the right of action first accrues." *Id.* at 507. This Court held that the claim "accrued" at the time of the "final decision" of the administrative body, not at the time of contractual performance:

> To hold that the six-year time period runs from the completion of the contract, as the Government in-

> sists, would have unfortunate impact. The contractor is compelled to resort to administrative proceedings which may be protracted and which may last not only beyond the completion of the contract but continue for more than six years thereafter. If the time bar starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided. This would be true whether he wins or loses before the board of appeals. Even if he prevailed there and was granted the equitable adjustments he sought, the Government would be immune from suit to enforce the award if more than six years had passed since the completion of the contract. This is not an appealing result, nor, in our view, one that Congress intended.

Id. at 511, 514.

Like government contract claims that "accrue" under *Crown Coat* only after mandatory procedures are completed, a MPPAA cause of action "arises" only after the statutory arbitration concludes or, if arbitration has not been initiated, after the employer fails to make payments within the prescribed time. 29 U.S.C. §§ 1401(b)(2), 1401(b)(1). To accept the Ninth Circuit's contrary reasoning would have the "unfortunate impact" of requiring pension funds throughout the country to exhaust MPPAA's procedural requirements, only to find that the statute of limitations had run in the interim. *See Crown Coat*, 386 U.S. at 514.

Third, the Ninth Circuit's concern as to "plan control" has no statutory basis. The issue of timeliness under MPPAA *must* be presented to the arbitrator, who has the power to sustain a laches defense. 29 U.S.C. § 1401(a); *see Ludington News Co.*, 9 Employee Benefits Cas. (BNA) 1913, 1919 n.9 (1988) (Cornelius, Arb.). Thus, an employer that claims prejudice by virtue of a plan's undue delay in seeking to collect withdrawal liability can put that defense before the MPPAA arbitrator, who is particularly qualified to decide its merits.

Cf. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

Crown Coat underscores the point. Echoing the *Thibodo* apprehension that the limitations period would be "in the control of the plaintiff," the United States argued that unless its reading of the statute prevailed, a contractor would have "unlimited discretion as to when to file his claim." 386 U.S. at 518. This Court was unpersuaded: because the standard government contract usually has "built-in time limits" for the processing of claims, no contractor could "delay unreasonably" in presenting a claim. *Id.* at 518-19 & n.13. So too does the "[a]s soon as practicable" language of MPPAA (29 U.S.C. § 1399(b)(1)) ensure that a plan does not sit on its claims to the employer's detriment.[11]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[11] A plan that unduly delays in taking appropriate action not only risks losing before the MPPAA arbitrator on the grounds of laches, but also "puts at risk the solvency of the plan and thus may invite a claim for breach of fiduciary duty" against the trustees. *Sandoz*, 871 F.2d at 1126.